Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ~~78~~ - 952

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Garnishee-Appellant,

vs.

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT:

(a) Opinions Below 1

(b) Grounds on Which Jurisdiction Is Invoked .. 2

(i) The Nature of the Proceeding 2

(ii) The Original Judgment Sought to Be Reviewed 3

(iii) Statutory Provisions Conferring Jurisdiction 3

(iv) Cases Sustaining Jurisdiction 3

(v) Statute Involved 4

(c) Question Presented 4

(d) Statement of the Case 5

(e) Substantiality of Federal Question 9

Conclusion 12

APPENDICIES:

Appendix A. Order of Minnesota District Court ...A-1

Appendix B. Opinion of Minnesota Supreme Court of September 10, 1976 .....A-8

Appendix C. Order of United States Supreme Court of June 27, 1977 .....A-27

Appendix D. Opinion of Minnesota Supreme Court of October 20, 1978 .....A-29

Appendix E. Judgment of Minnesota Supreme Court A-47

Appendix F. Notice of Appeal A-48

TABLE OF AUTHORITIES

Constitutional Provisions:

Fourteenth Amendment to United States Constitution 3

Statutes:

United States Code:
28 U.S.C. §1257(2) 3
28 U.S.C. §2103 3
Minnesota Statutes:
Minn. Stat. §571.41(2) 2, 4, 5

Cases:

DeRentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969) 11
Donawitz v. Danek, 366 N.E. 2d 253 (N.Y. 1977) ... 6
Forbes v. Boynton, 113 N.H. 617, 313 A. 2d 129 (1973) 10
Government Employees Insurance Co. v. Lasky, 454 S.W. 2d 942 (Mo. 1970) 11
Hanson v. Denckla, 357 U.S. 235 (1958) 3, 9
Harris v. Balk, 198 U.S. 215 (1905) 6, 7
Henry v. City of Rock Hill, 376 U.S. 776 (1964) ..3, 12
Home Insurance Co. v. Dick, 281 U.S. 397 (1930) .3, 9
Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967) 11
Howard v. Allen, 254 S. C. 455, 176 S.E. 2d 128 (1970) 11
International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) 5, 7, 9
Javorek v. Superior Court, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976) 11
Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 2d 187 (Okl. 1972) 11
Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972) 11
Lee-Hy Paving Corp. v. O'Connor, U.S. Sup. Ct. No. 78-140 6
Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2nd Cir. 1968) 6
O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194 (2nd Cir. 1978) 6
Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970) 11
Robinson v. Shearer & Sons, Inc., 429 F. 2d 83 (3rd Cir. Pa. 1970) 11
Rush v. Savchuk, 433 U.S. 902 (1977) 2, 3, 4
Savchuk v. Rush, 245 N.W. 2d 624 (Minn. 1976) .. 1
Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W. 2d 665 (1974) 10
Seider v. Roth, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966) 6, 9, 10, 11
Shaffer v. Heitner, 433 U.S. 186 (1977) ..3, 4, 5, 7, 9
Simpson v. Loehmann, 21 N.Y. 2d 305, 234 N.E. 2d 699 (1967) 6
Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975) .. 11
United States v. E. I. DuPont de Nemours & Co., 366 U.S. 316, 325 (1960) 3
Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 3, 9
Werner v. Werner, 84 Wash. 2d 360, 526 P. 2d 370 (1974) 11

Secondary Authorities:

McLaughlin, New York Trial Practice, 179 N.Y.L.J. 1 (July 14, 1978) 10
Siegel, Supplementary Practice Commentary, McKinney's (New York) C.P.L.R., §5201, pocket part, pp. 15-78 (1974) 10-11
Zammit, Quasi in Rem Jurisdiction: Outmoded and Unconstitutional, 49 St. John L. Rev. 668 (1975) .. 11
Comment, 16 Buffalo L. Rev. 769 (1968) 11
Comment, 67 Columbia L. Rev. 550 (1967) 11
Note, Attachment of Liability Insurance Policies, 53 Cornell L. Rev. 1108 (1968) 11
Comment, 17 Dickinson L. Rev. 653 11

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No. ———

RANDAL RUSH,
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vs.

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

(a) OPINIONS BELOW

The order of the Minnesota District Court was not reported. It appears as Appendix A hereto (pp. A. 1-7, *infra*).

The initial opinion of the Minnesota Supreme Court affirming the District Court's order is reported: *Savchuk v. Rush*, 245 N.W. 2d 624 (Minn. 1976). It appears as Appendix B hereto (pp. A. 8-27, *infra*).

The order of this Court vacating the judgment of the Minnesota Supreme Court is reported: *Rush v. Savchuk,* 433 U.S. 902 (1977). It appears as Appendix C. hereto (pp. A. 27-28, *infra).*

The opinion of the Minnesota Supreme Court reaffirming the District Court's order is not yet reported. It appears as Appendix D hereto (pp. A. 29-46, *infra).*

(b) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) *Nature of the proceeding.* This is a civil action by appellee (hereinafter Savchuk) against appellant (hereinafter Rush) for damages arising out of a 1972 Indiana automobile accident. At that time both Savchuk and Rush were citizens and residents of Indiana. At that time Rush and State Farm Mutual Automobile Insurance Company (hereinafter State Farm) were parties to a contract of automobile liability insurance issued in Indiana.

In 1973, after emigrating from Indiana to Minnesota, Savchuk commenced this action against Rush in the Minnesota District Court, claiming *quasi in rem* jurisdiction over Rush pursuant to Minn. Stat. §571.41(2). This statute, as construed by the Minnesota Supreme Court, permits a Minnesota resident to obtain *quasi in rem* jurisdiction over a non-resident by garnishing the non-resident's insurer provided that the insurer does business in Minnesota.

Rush and garnishee State Farm moved the District Court for a dismissal asserting lack of jurisdiction and denial of federal due process in the exercise of such jurisdiction. The motion was denied and an appeal was taken to the Minnesota Supreme Court. Following an affirmance, Rush and State Farm appealed to this Court which vacated the

Minnesota Supreme Court's judgment and remanded the matter to that Court. Following remand, the Minnesota Supreme Court again held that Minnesota's exercise of *quasi in rem* jurisdiction did not violate the due process clause of the XIVth Amendment to the United States Constitution.

(ii) *Original Judgment Sought to Be Reviewed.* The decision of the Minnesota Supreme Court was filed on October 20, 1978, and the judgment sought to be reviewed was entered on November 3, 1978. The judgment appears as Appendix E hereto (p. A. 47, *infra).* The notice of appeal was filed on November 17, 1978, and appears as Appendix F hereto (pp. A. 48-49, *infra).*

(iii) *Statutory Provision Conferring Jurisdiction.* The statutory provisions which confer jurisdiction of this appeal are 28 U.S.C. §1257(2) and, alternatively, 28 U.S.C. §2103.

(iv) *Cases Sustaining Jurisdiction.* Cases believed to sustain jurisdiction: *Shaffer v. Heitner,* 433 U.S. 186 (1977); *Hanson v. Denckla,* 357 U.S. 235 (1958); *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954); *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930).

Furthermore, pursuant to this Court's order in *Rush v. Savchuk,* 433 U.S. 902 (1977), it is believed that appellants are entitled to invoke this Court's plenary jurisdiction to enforce its mandates. *United States v. E. I. DuPont de Nemours & Co.,* 366 U.S. 316, 325 (1960); see also, *Henry v. City of Rock Hill,* 376 U.S. 776 (1964).

(v) *Statute involved.* 4 Minnesota Statutes, §571.41, subd. 2 (1971), provides:

> "Garnishment shall be permitted before judgment in the following instances only:
>
> (1) For the purpose of establishing quasi in rem jurisdiction
>
> (a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or
>
> (b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or
>
> (c) the defendant is a non-resident individual, or a foreign corporation, partnership or association.
>
> (2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

(c) QUESTION PRESENTED

The Minnesota Court's construction of Minn. Stat. §571.41(2), in direct contravention of *Shaffer v. Heitner,* 433 U.S. 186 (1977), and of this Court's order, *Rush v. Savchuk,* 433 U.S. 902 (1977), grants to Minnesota courts *quasi in rem* jurisdiction over non-resident defendants who have absolutely no "minimum contacts" whatsoever with Minnesota in situations where the garnished "property" is not the subject of the litigation.

Thus, the question is: Does Minnesota's garnishment procedure pursuant to Minn. Stat. §571.41(2), as interpreted by the Minnesota Supreme Court, offend the traditional XIVth Amendment standards of fairness and substantial justice enunciated in *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945), which standards are expressly made applicable to *quasi in rem* proceedings by *Shaffer v. Heitner,* 433 U.S. 186 (1977)?

(d) STATEMENT OF THE CASE

In January 1972, Savchuk was a passenger in an automobile driven by Rush in Elkhart, Indiana. Both were Indianans. As a result of an accident, Savchuk allegedly sustained personal injuries. Rush was insured by State Farm which does business in Indiana and most of the other 47 contiguous states. Pursuant to the insurance policy, which is an Indiana contract, State Farm was obligated to defend Rush in the event of a suit claiming negligent operation of the automobile, and to pay any judgment rendered against him.

No suit was commenced in Indiana. Indiana has a guest statute which would effectively bar any suit by Savchuk.

In 1973, Savchuk emigrated to Minnesota (which does not have a guest statute and where foreign guest statutes are not enforced) and attempted to sue Rush by having Rush personally served in Indiana and by garnishing the State Farm policy—State Farm being subject to service of garnishment process in Minnesota because it also does business there.

Rush and State Farm immediately raised the federal constitutional question claiming lack of due process. Following the denial of their motion to dismiss, they appealed to

the Minnesota Supreme Court again raising the constitutional questions. The Minnesota Court properly undertook to decide the constitutional questions and improperly determined that there was no denial of due process to Rush. The Court reasoned that there was due process because (1) Rush had actual notice of the suit; (2) Rush's liability was limited to the amount of the insurance policy; and (3) because the *quasi in rem* procedure could only be used by claimants who were residents of Minnesota (App. B, p. A. 14).[1]

The Minnesota Court's exercise of such *quasi in rem* jurisdiction was first approved in *Seider v. Roth*, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966). The *Seider* rule has survived previous constitutional attack. E.g., *Simpson v. Loehmann*, 21 N.Y. 2d 305, 234 N.E. 2d 669 (1967), 21 N.Y. 2d 990, 238 N.E. 2d 319 (1968); *Minichiello v. Rosenberg*, 410 F. 2d 106, 117 (2nd Cir. 1968), *cert. denied*, 396 U.S. 844, 949 (1969); *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2nd Cir. 1978), *cert. denied sub nom. Lee-Hy Paving Corp. v. O'Connor*, U.S. Sup. Ct. No. 78-410 (Dec. 4, 1978), Powell and Blackmun, J.J., dissenting. Both the *Simpson* and the *Minichiello* courts determined that the *Seider* rule did not deny due process because of *Harris v. Balk*, 198 U.S. 215 (1905). Simply stated, *Harris v. Balk* stood for the proposition that the fictional presence of an intangible property right of a defendant in the forum state provided an *in rem* jurisdictional basis for the courts of that state, after a fictional seizure of that property by plaintiff, to determine any suit by plaintiff against defendant and to grant relief against defendant not exceeding the value of the property seized even though the seized property was not the subject matter of the suit.

[1]Minnesota's refusal to afford its *quasi in rem* procedures to non-residents would appear to create a serious equal protection problem. See *Donawitz v. Danek*, 366 N. E. 2d 253 (N. Y. 1977).

Then came *Shaffer v. Heitner*, 433 U.S. 186 (1977), in which this Court held that the minimum contacts standards of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), are applicable to *in rem* actions as well as *in personam* actions, thus effectively overruling *Harris v. Balk*, *supra*.

Following this Court's decision in *Shaffer v. Heitner*, *supra*, its vacation of the Minnesota Supreme Court's judgment, and its remand of this case to that Court, a majority of the Minnesota Court adhered to their earlier pronouncement. In essence, the Minnesota Court reasoned:

1. That *Shaffer v. Heitner*, *supra*, is "not clear" (App. D, p. A. 34);

2. That "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum, but may override [sic] traditional choice of law analysis" (App. D, pp. A. 36-37); and, therefore,

3. "It cannot be said that Minnesota lacks such minimally-requisite 'contacts, ties or relations' to those defending parties as to offend the requirements of due process" (App. D, p. A. 39).

The dissenting opinion of Mr. Justice Otis (in which two other Justices concurred), quite correctly points out that—

> "The inference to be drawn from this remand [by the United States Supreme Court] is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme

Court. As I construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.

"Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.

"First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.

"Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.

"Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff*. 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01." (App. D, pp. A. 39-40; emphasis by the Court).

The effect of the Minnesota Court's decisions is that two non-residents of Minnesota may be involved in an accident anywhere in the world and yet Minnesota courts will assume *quasi in rem* jurisdiction over the matter if the plaintiff comes to Minnesota, sues, and garnishes the defendant's insurer's "indebtedness". And, according to the Minnesota Court, Minnesota's assumption of jurisdiction is proper regardless of the fact that the defendant has no minimal contact whatsoever with Minnesota and regardless of the fact that the garnished "indebtedness", the res, is not in any way the subject matter of the litigation between plaintiff and defendant.

Quite clearly, the Minnesota Court has chosen to ignore the teaching of this Court in *Shaffer v. Heitner, supra.*

(e) SUBSTANTIALITY OF FEDERAL QUESTION

As stated above, the Minnesota Supreme Court has determined to adhere to the New York rule of *Seider v. Roth, supra,* and to permit suits against non-residents who have no minimum contacts with the State of Minnesota on a *quasi in rem* jurisdictional basis predicated upon a fictional seizure of fictional property in Minnesota, which property is not the subject matter of the suit. Thus, the Minnesota Court has chosen to disregard the clear holdings of this Court in *International Shoe Co. v. State of Washington, supra,* and in *Shaffer v. Heitner, supra,* as well as *Hanson v. Denckla,* 357 U.S. 235 (1958); *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954); and *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930), with the result that appellant Rush is deprived of due process of law in violation of the XIVth Amendment. Thus, a very substantial federal question exists as to Mr. Rush.

But Mr. Rush is not alone. Since the Minnesota Court's initial decision, literally scores of *Seider v. Roth* suits have been commenced in Minnesota. Because of the inherent di-

versity-of-citizenship nature of these cases, many of them have been removed to the U.S. District Court where they enhance the burden of that overburdened Court. In New York, the *Seider* rule has spawned a continuing hotbed of litigation resulting in numerous appeals in both federal and state courts in which non-resident defendants have sought (unsuccessfully so far) to obtain due process. New Hampshire has adopted the *Seider* rule solely in retaliation to New York's use of *Seider* against New Hampshire residents. *Forbes v. Boynton*, 113 N.H. 617, 313 A. 2d 129 (1973).

Litigants, such as Mr. Rush, are required to travel long distances to attend their trial and—due to the usual litigation delays—may be required to spend considerable time away from their homes and occupations. Usually, their accident and medical witnesses reside in the *locus delicti* and the testimony of such witnesses can only be presented by cumbersome depositions—if at all. A proper view of the accident scene is impossible. Such litigants are foreclosed from having jurors drawn from the accident area. Furthermore, they may well be subject to the additional expense and hazard of relitigating the same matter in a subsequent *in personam* action in the *locus delicti*. Finally, they may be deprived of the *lex loci delictus* and may be subject to foreign law in the determination of their rights.[2]

Seider has also spawned a storm of academic criticism: e.g., McLaughlin, *New York Trial Practice*, 179 N.Y.L.J. 1 (July 14, 1978); Siegel, *Supplementary Practice Commentary*, McKinney's (New York) C.P.L.R., §5201, pocket part, pp. 15-78 (1974); Zammit, *Quasi in Rem Jurisdiction: Outmoded and Unconstitutional*, 49 St. John L. Rev. 668 (1975); *Comment*, 16 Buffalo L. Rev. 769 (1968); *Comment*, 67 Columbia L. Rev. 550 (1967); *Note, Attachment of Liability Insurance Policies*, 53 Cornell L. Rev. 1108 (1968); *Comment*, 17 Dickinson L. Rev. 653.

[2]For example, in the instant case, if tried in Minnesota, Mr. Rush will lose the benefits of Indiana's guest statute and contributory negligence law, and will be subject to the Minnesota comparative negligence law. *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N. W. 2d 665 (1974).

So far, litigants have sought to establish the *Seider* rule in eleven other states without success.[3] However, if the instant case is not reversed by this Court, it is not improbable that some of these courts (and other courts as well) will incorrectly conclude that *Seider v. Roth* does provide a constitutional basis for acquisition of jurisdiction of no-contact non-residents with the result that hundreds and hundreds of litigants will be deprived of due process. If this appeal is not heard, there certainly will be others with the result that, sooner or later, this Court will undertake to determine the matter.[4] It is respectfully suggested that now is the time to put an end to this pernicious rule by a clear declaration that *Seider v. Roth* and its progeny constitute a constitutionally impermissible exercise of jurisdiction by state courts over residents of other states.

[3]E.g., *Javorek v. Superior Court*, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976); *Sykes v. Beal*, 392 F. Supp. 1089 (D. Conn. 1975); *Kirchman v. Mikula*, 258 So. 2d 701 (La. App. 1972); *Government Employees Insurance Co. v. Lasky*, 454 S. W. 2d 942 (Mo. 1970); *Johnson v. Farmers Alliance Mutual Ins. Co.*, 499 P. 2d 187 (Okl. 1972); *Robinson v. Shearer & Sons, Inc.*, 429 F. 2d 83 (3rd Cir. Pa. 1970); *DeRentiis v. Lewis*, 106 R. I. 240, 258 A. 2d 464 (1969); *Howard v. Allen*, 254 S. C. 455, 176 S. E. 2d 128 (1970); *Housley v. Anaconda Co.*, 19 Utah 2d 124, 427 P. 2d 390 (1967); *Ricker v. Lajoie*, 314 F. Supp. 401 (D. Vt. 1970); *Werner v. Werner*, 84 Wash. 2d 360, 526 P. 2d 370 (1974).

[4]Cf. *Pemberton v. Sperandio*, U. S. Sup. Ct. No. 78-44 (1978), *vacating judgment in Sperandio v. Pemberton*, 568 S. W. 2d 935 (Mo. 1978).

CONCLUSION

Appellants respectfully request the Court to reverse in all respects the judgment of the Supreme Court of Minnesota.

It is respectfully suggested that this is a proper case for summary reversal with direction to dismiss the action. See *Henry v. City of Rock Hill*, 376 U.S. 776 (1964).

Respectfully submitted,

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Appendices

APPENDIX A

[Minnesota District Court, Hennepin County, 4th Judicial District]

JEFFREY D. SAVCHUK,

Plaintiff,

vs.

RANDAL RUSH,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Garnishee.

ORDER

File No. 706126

The above-entitled matter came regularly on for hearing before the undersigned, sitting as Judge of Special Term, on motion of the plaintiff on July 24, 1974 and the Court took said motion under advisement to give defendant and garnishee an opportunity to prepare, serve and file additional motions which were heard on August 15, 1974.

Richard Diamond, Esq., appeared as counsel for and on behalf of plaintiff, and James A. Roegge, Esq., appeared as counsel for and on behalf of defendant and garnishee.

Upon all the files, records and proceedings herein, and upon the arguments of counsel, IT IS ORDERED:

That plaintiff be, and hereby is, granted leave to serve and file a Supplemental Complaint making State Farm

Mutual Automobile Insurance Company, the garnishee herein, a party to the above-entitled action.

That the motions of defendant and garnishee be, and hereby are, denied.

Dated: August 28, 1974.

BY THE COURT:

/s/ DOUGLAS K. AMDAHL
Chief Judge

MEMORANDUM

FACTS

On January 13, 1972 an automobile accident occurred in Elkhart, Indiana. The plaintiff, Jeffrey D. Savchuk, and defendant, Randal Rush, were involved in that accident and the present action arose out of such accident. At the time of the accident plaintiff and defendant were each residents of the State of Indiana. Defendant is still a resident of such state. Plaintiff, who was born October 21, 1953, was living with his parents at the time of the accident. He graduated from Elkhart (Indiana) Senior High School in June of 1972 and worked in Elkhart until June of 1973 when his parent moved to Minnesota and plaintiff moved with them. Plaintiff became employed with Commercial Steel shortly after his arrival in Minnesota and still works for that company. He was married on September 15, 1973 and since that time lives with his wife at 8447 Regent Avenue North, Brooklyn Park, Minnesota. His affidavit filed herein states that he considers Minnesota to be his home of permanent residence and that he has no intention of leaving such state.

Defendant was insured for automobile liability through a policy issued by State Farm Mutual Automobile Insurance Company, which company is licensed to do business in Minnesota. A garnishment summons was served on said insurance company by delivering a copy thereof to the Commissioner of Insurance of the State of Minnesota pursuant to statute. A copy of the garnishment summons and the Summons and Complaint were personally served on defendant in Elkhart County, Indiana.

A form garnishment disclosure was served by mail upon plaintiff's attorney, and said disclosure stated that there was no amount due and owing the judgment debtor by the garnishee and that said garnishee had no property of defendant in its possession.

On July 24, 1974 the undersigned, sitting as Judge of Special Term, heard plaintiff's motion, pursuant to Minnesota Statute 571.51 for leave to file and serve a Supplemental Complaint making the garnishee a party to the action. On the date of such motion, the Court was informed that it was the intention of the attorney for defendant and garnishee to move the Court for other relief and plaintiff's motion was taken under advisement pending the further motions of the defendant and the garnishee. On August 15, 1974 the counsel for defendant and garnishee argued their motion moving the Court "for an Order dismissing the plaintiff's pretended cause of action on the grounds that this Court lacks jurisdiction over the subject matter and the Court lacks jurisdiction over the defendant; that there is insufficiency of process; that there is insufficiency of service of process," and further moved the Court "for an Order dismissing the plaintiff's pretended cause of action on the ground that the defendant is entitled to judg-

ment of dismissal on the pleadings pursuant to Rule 12.03 of the Minnesota Rules of Civil Procedure."

ISSUE

Is the obligation of an insurance company to defend a non-resident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi in rem jurisdiction in circumstances where the occurrence giving rise to an action occurs out of the State of Minnesota and the plaintiff is a resident of the State of Minnesota?

ARGUMENT

The Supreme Court of the State of Minnesota has not passed upon the question presented by the issue here. However, the United States District speaking through the late Judge Neville in *Rintala v. Shoemaker,* 362 F.Supp. 1044 D.C. Minn. (1973) considered the identical question, and in a thorough opinion determined the question in the affirmative and held that quasi in rem jurisdiction was valid under like circumstances. Judge Neville's analysis of the issue begins with a discussion of *Seider v. Roth,* 17 N.Y. (2d) 111, 269 N.Y.S. (2d) 99, 216 N.E. (2d) 312 (1966) the first reported case determining that the obligation to defend was a garnishable res and continues through a discussion of cases pro and con, and the Minnesota garnishment law which was amended in 1969 by adding subdivision 2 to M.S. 57.41 so that it now reads:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:

> "(1) For the purpose of establishing quasi in rem jurisdiction . . .
>
> "(c) the defendant is a nonresident individual
>
> . . .
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

This Court is persuaded by Judge Neville's logic and feels that it could add little, if anything, to his opinion and adopts such opinion as the basis for its determination and adds only the following observation.

In *Turner v. Evers,* 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (supra 1973) Judge Goldberg made the following observation which points up the necessity of basic garnishment law consideration:

> "Our attention has been directed to several cases rejecting *Seider,* and we have found several more. These cases do not hold that there is no jurisdiction in the constitutional sense. Rather they hold that the obligation due from the insurer to the defendant cannot be attached. (Jardine v. Donnelly (1964) 413 Pa. 474, 198 A.2d 513 (pre-Seider perfunctory opinion); Housley v. Anaconda Company (1967) 19 Utah 2d 124, 425 P.2d 390 (post-Seider but does not cite it); DeRentiis v. Lewis (1969) (R.I.) 258 A2d 464 (not 'property' within Rhode Island statute); Howard v. Allen (1970) 254 S.C. 455, 176 S.E.2d 127; (dis-

tinguishes New York from South Carolina attachment statutes); Government Employees Insurance Company v. Lashy (Mo. App. 1970) 454 S.W. 2d 942 ('contingent' under Vermont statute); Kirchman v. Mikula (La. App. 1972) 258 So.2d 701 (interpretation of Louisiana 'direct action' statute.) None of these cases discloses statutes as broad as that in California or a course of interpretation similar to that here. Nor do they reveal the sort of independent parallelism between their local law and New York law like that between California and New York."

Since our garnishment law does now provide for prejudgment garnishment when the garnishee and the debtor are parties to a contract of insurance, the foregoing statement adds much weight to the determination by Judge Neville.

A further issue was raised in the arguments before this Court. Such issue arose by reason of language in Rule 4.04 of the Rules of Civil Procedure for the District Courts, which provides:

> "When quasi in rem jurisdiction has been obtained, a party defending such acts thereby submits personally to the jurisdiction of the court . . ."

The problem is, of course, that if the defendant does not come to the State of Minnesota to defend the action he is not cooperating with the insurance company and may be determined to have no coverage. If he does come to the state to defend the action, he submits, by reason of the foregoing rule, personally to the jurisdiction of the Court and may be subject to an in personam judgment in an

amount over and above the limits of his insurance policy. While this Court feels that the rule would not be effective in this type of situation, it does not have to decide such issue for the reason that the plaintiffs have stipulated that they seek no judgment in an amount larger than that of the policy limits.

D.K A.

APPENDIX B

[Minnesota Supreme Court]

NO 268 (1975)

Hennepin County

JEFFREY D. SAVCHUK,

Respondent,

vs.

45556

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Sheran, C. J.
Dissenting, Otis, J.
Endorsed
Filed September 10, 1976
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

2. Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases

where jurisdiction is obtained pursuant to § 571.41, subd. 2, only to the extent of the defendant's policy limits.

3. Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

Affirmed.

Heard before Sheran, C. J., and Otis, Todd, MacLaughlin, and Scott, JJ., and considered and decided by the court en banc.

OPINION

SHERAN, Chief Justice.

Appeal by defendant, Randal Rush, and garnishee, State Farm Mutual Automobile Insurance Company (State Farm), from an order by the district court granting plaintiff's motion to file and serve a supplemental complaint and denying appellants' motion to dismiss the complaint. We affirm the decision of the trial court for these reasons:

(1) Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

(2) Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases where jurisdiction is obtained pursuant to §571.41, subd. 2, only to the extent of the defendant's policy limits.

(3) Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

The case arose out of a single-car accident which occurred January 13, 1972, in Elkhart, Indiana. The accident involved a car driven by Rush and owned by his father, in which Jeffrey D. Savchuk was a passenger. The Rush car was insured by State Farm. Rush and Savchuk were both residents of Indiana at the time of the accident. Savchuk, a senior in high school when the accident occurred, moved to Minnesota with his parents in June 1973 and is now an employed and married resident of this state.

The instant action was commenced May 28, 1974, when Savchuk served a garnishment summons on State Farm. Service was made by delivery of a copy of the summons to the commissioner of insurance for the state of Minnesota, pursuant to Minn. St. 60A.19. A copy of the garnishment summons, along with copies of the summons and complaint, was also served personally on Rush in Indiana. The complaint alleged negligence and sought $125,000 in damages.

In response to the garnishment summons, State Farm disclosed pursuant to § 571.49 that nothing was due and owing Rush as judgment debtor, Savchuk then moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action pursuant to § 571.51. Rush and State Farm responded by moving for dismissal on the following grounds: Lack of subject-matter jurisdiction, lack of jurisdiction over the defendant, insufficiency of process, and insufficiency of service of process. Since the jurisdictional challenge raised

by the motion to dismiss also raised a question as to the constitutionality of the application on these facts of § 571.41, the attorney general was invited to intervene. That invitation was declined. The respective motions were then heard by the court. His order granting Savchuk's motion for leave to file a supplemental complaint and denying the motion of Rush and State Farm to dismiss precipitated this appeal.

Two main issues are presented: (1) Is the obligation of an insurance company to defend and indemnify a nonresident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs outside Minnesota but the plaintiff in the action is a resident of Minnesota? (2) If the obligation of an insurance company to defend and indemnify its insured is a garnishable res, does it seizure and the resultant quasi-in-rem jurisdiction conform with constitutional requirements of due process?

1. Appellants contend that an insurance company's obligation to defend and indemnify its insured cannot constitute a res garnishable under Minn. St. 571.41, subd. 2, because such an obligation is not "due absolutely, and without depending on any contingency," as required by § 571.43(1).[1] In effect, appellants argue that the prejudg-

[1]Minn. St. 571.41, subd. 2, reads in part: "Garnishment shall be permitted before judgment in the following instances only:

"(1) For the purpose of establishing quasi in rem jurisdiction

"(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

ment garnishment sanctioned by subd. 2 of Minn. St. 571.41 can be obtained only when the "due absolutely, and without * * * any contingency" language of § 571.43 (1) is first satisfied.

It seems to us that the intent of the legislature in enacting § 571.41, subd. 2, was to specify a limited number of instances in which garnishment (and quasi-in-rem jurisdiction) would be available before judgment, regardless of whether the debt on which the garnishment was predicated was due absolutely.

Several reasons support this conclusion. First, the language of § 571.41, subd. 2, itself indicates that the test for determining the validity of prejudgment garnishment when the garnishee and debtor are parties to a contract of insurance is not whether the debt is due absolutely but rather whether the garnishee "*may* be held to respond" for the claim asserted against the debtor. State Farm's *potential* liability is conceded here, and *potential* liability is all that subd. 2 requires.[2]

"(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

"(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association."

Minn. St. 571.43(1) reads: "(1) [No person or corporation shall be adjudged a garnishee by reason of:] (1) Any money or other thing due to the judgment debtor, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency."

[2]In construing a statute less explicit than the one here in question, the court in Turner v. Evers, 31 Cal. App. Supp. 3d 11, 18, 107 Cal. Rptr. 390, 395 (1973), stated: "* * * We disagree with the proposition that the 'obligation to indemnify requires a valid in personam judgment against the insured,' and hold the obligation to indemnify requires only the *possibility* of a valid judgment either against the insured personally or depriving him of his property." (Italics supplied.)

See, also, Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

Second, § 571.41, subd. 2, is both more recent in origin and more specific in language than § 571.43.[3] Because we perceive an irreconcilable conflict between these two statutory provisions, § 571.41, subd. 2, controls.[4] Minn. St. 645.26.

Third, our interpretation of § 571.41, subd. 2, as permitting prejudgment garnishment and the establishment of quasi-in-rem jurisdiction in the circumstances here presented is consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum limits consistent with due process.[5]

We therefore hold that under § 571.41, subd. 2, an automobile insurance company's obligation to defend and indemnify its insured is a res subject to prejudgment garnishment for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs

[3]Section 571.43 has remained substantially unchanged since 1957; subd. 2 of § 571.41 was added in 1969. Subd. 2 refers specifically to insurance contracts and seems to contemplate precisely the situation presented here. The fact that § 571.43 speaks of "judgment debtor," while § 571.41, subd. 2, applies in a prejudgment context also suggests a reason for being guided by the latter provision. Note, however, that § 571.41, subd. 3, does indicate that § 571.41, subd. 2, parties are properly to be referred to as judgment debtor and judgment creditor, even though no judgment has yet been obtained.

[4]See, Comment, 1 Wm. Mitchell L. Rev. 161, 176, for an analysis of the statute which reconciles the insurance provision of § 571.41 with the contingency provisions of § 571.43. Our view of the two enactments as irreconcilably in conflict was the view taken by the late Judge Philip Neville in Rintala v. Shoemaker, *supra*.

[5]See, B & J Mfg. Co. v. Solar Industries, Inc., 483 F. 2d 594 (8 Cir. 1973) (applying Minnesota law); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 N.W. 2d 140 (1974); Franklin Mfg. Co. v. Union Pacific R. Co., 297 Minn. 181, 210 N.W. 2d 227 (1973); Mid-Continent Freight Lines, Inc. v. Highway Trailer Industries, Inc., 291 Minn. 251, 190 N.W. 2d 670 (1971); Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W. 2d 292 (1969), certorari denied sub. nom. Burke v. Hunt, 397 U.S. 1010, 90 S. Ct. 1239, 25 L. ed. 2d 423 (1970).

outside the state of Minnesota but the plaintiff in the action is a resident of Minnesota.

2. The test for determining the constitutionality of the prejudgment garnishment procedure authorized by Minn. St. 571.41, subd. 2, is threefold: (1) Proper notice must be given to the defendant-insured, affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state. Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2 Cir. 1968, 1969); Rintala v. Shoemaker, 362 F.Supp. 1044 (D. Minn. 1973).

Plaintiff was a resident of the state at the time this action was commenced,[6] and proper notice was given.[7] The constitutional issue therefore reduces to a question of defendant's potential liability if the procedure authorized by subd. 2 of § 571.41 is permitted. Appellants argue that Rule 4.04(2), Rules of Civil Procedure, which states in part that "[w]hen quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," means that a defendant in Rush's position[8] would find himself exposed to poten-

[6]Application of Minn. St. 571.41, subd. 2, must be limited to plaintiffs who are residents of the forum state, since without this connection the state would lack sufficient meaningful contact with the suit to justify the exercise of jurisdiction. Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969).

[7]Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. ed. 865 (1950), established the notice requirement.

[8]Most automobile insurance policies, including, apparently, the one here, contain a clause which requires the insured to cooperate with the insurer in the defense of any claim. If the insured fails to cooperate, the insurer need not indemnify. The practical effect of the clause means that defendants like Rush must defend in Minnesota or risk losing the right to be indemnified. Ritnala v. Shoemaker, 362 F. Supp. 1044, 1054; Comment, 1 Wm. Mitchell L. Rev. 161, 180.

tially unlimited personal liability in an action in which the plaintiff originally could have obtained only quasi-in-rem jurisdiction. Because of Rule 4.04(2), appellants argue, quasi-in-rem jurisdiction, with liability limited to the policy amount, is transformed into personal jurisdiction with potential liability extended beyond the policy limits.

If appellants correctly state the effect of Rule 4.04(2) in these circumstances, it is obvious that due process would be violated. Rintala v. Shoemaker, 362 F. Supp. 1044, 1054; Podolsky v. Devinney, 281 F. Supp. 488 (S. D. N. Y. 1968). The underlying question here, however, is not the *effect* of Rule 4.04(2), but whether in fact the rule applies to a case of this kind.

New York was the first state to permit a procedure for obtaining jurisdiction similar to the procedure invoked here. Seider v. Roth, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). New York also had a rule similar to Rule 4.04 (2), but when the issue of the rule's applicability was raised, the New York Court of Appeals simply held that it did not apply in Seider-type cases. Simpson v. Loehmann, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968) (per curiam opinion denying reargument). Thus, in New York, even though the defendant proceeds with the defense on the merits, he does not become personally exposed. New Hampshire has reached a similar conclusion. Forbes v. Boynton, 113 N.H. 617, 313 A. 2d 129 (1973). Today we do likewise.

Basic considerations of fairness underlie our decision. The United States Supreme Court has indicated that a defendant must act to purposefully avail himself of the privilege of conducting activities in the forum state before personal jurisdiction over him may be properly asserted.

Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958). Defendant Rush had engaged in no such voluntary activity; personal jurisdiction over him could not be justified. Plaintiff's reduction of his claim to $50,000, the policy limits, is an implicit recognition of this fact.

But to say that *personal* jurisdiction would not be justified, and to hold, as we do, that Rule 4.04(2) has no application in cases where jurisdiction is obtained pursuant to Minn. St. 571.41, subd. 2, is not to say that *no* jurisdiction over the defendant can be maintained. On the contrary, considerations of fairness suggest the need for quasi-in-rem jurisdiction obtainable via a prejudgment garnishment procedure like that permitted by § 571.41, subd. 2. In cases of this kind, the insurer controls the defense of the case. Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. W. 2d 669 (1967). Minimum contacts sufficient to provide a constitutional basis for the attachment and quasi-in-rem (as distinguished from personal) jurisdiction can be found in the fact that the insurer is present in the state, registered to do business and doing business here, and in the state's legitimate interest in protecting its residents and providing them with a forum in which to litigate their claims.[9] Rintala v. Shoemaker, 362 F. Supp. 1044, 1057; Forbes v. Boynton, 113 N.H 617 623, 313 A. 2d 129, 132.

[9]If a formum is not provided, and the plaintiff is thus denied an opportunity to recover, the state may wind up as the "insurer," paying through its welfare and social assistance programs for the care of an individual injured by the insured. As was stated in Rintala v. Shoemaker, 362 F. Supp. 1044, 1052, the plaintiff in this case is a Minnesota resident, and "[i]t is this state which must protect and care for the plaintiff in the event of indigency [and] this state's services which plaintiff uses."

We therefore held that due process is not violated when jurisdiction is obtained pursuant to § 571.41, subd. 2, provided that (1) proper notice is given to the defendant insured, adequate to give him opportunity to defend his property; (2) that the defendant-insured's liability is limited to the applicable policy limits of his insurance contract; and (3) that the plaintiff in the action is a resident of the state at the time the action is commenced.

3. Appellants' argument that the procedure authorized by § 571.41, subd. 2, constitutes a direct action against the insurer was not raised below. The defendant, not the insurer, is the party sued. There is nothing in the statute which suggests that the insurer should be named as a defendant. Rintala v. Shoemaker, 362 F. Supp. 1044, 1051.

We recognize that other states have rejected the procedure we approve.[10] We further recognize that some critics view Seider-type jurisdiction as a solution which creates more problems than it solves.[11] We limit our discussion of these problems to the following observations:

The potential hardship on defendants who may be required to come long distances to defend claims legiti-

[10]Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Howard v. Allen, 254 S. Ct. 455, 176 S.E 2d 127 (1970); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967); Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972) (interpreting Massachusetts law); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 2d 1387 (Okla. 1972); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975) (interpreting Connecticut law); Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970) (interpreting Federal maritime and Pennsylvania law).

[11]The most persisent and prolific is Professor David D. Siegel, who, since 1966, has written on Seider in annual supplementary commentaries to N.Y. Civ. Prac. § 5201 (McKinney Supp. 1975). Other critical commentary has appeared in Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 Col. L. Rev. 660;

mately brought by Minnesota plaintiffs is reduced by the availability of convenient transportation and by the fact that in many cases the defendant's testimony can be obtained by deposition. Where this is not possible, the hardship and expense of travel will ordinarily be no greater for the defendant than it would be for the injured party should jurisdiction be refused.

A quasi-in-rem judgment against the defendant would apparently not work an estoppel against the defendant if the plaintiff attempts to sue again outside the state of Minnesota to recover amounts beyond the policy limits. Minichiello v. Rosenberg, 410 F.2d 106, 112; Note, 65 Harv. L. Rev. 818, 834. Any hardship to the defendant arising out of a potential second suit against him is no more than has always existed in quasi-in-rem actions. Often, as here, a second suit will be impossible because the statute of limitations has run in the only available alternate forum. Ordinarily, a second suit against a remote defendant whose liability insurance has been exhausted would seem unlikely.

Finally, and most significantly, if jurisdiction is technically proper under § 571.41, subd. 2, but it nonetheless involves inconvenience for the defendant which outweighs the plaintiff's interest in a Minnesota forum and other relevant factors, then the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non conveniens. Willoughby v. Hawkeye-Security Ins. Co.

Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N. Y. U. L. Rev. 1075; Note, 8 B. C. Ind. & Com. L. Rev. 147; Comment, 16 Buffalo L. Rev. 769; Comment, 67 Col. L. Rev. 550; Note, 71 Dickinson L. Rev. 653; Note, 64 Nw. U. L. Rev. 407; Note, 43 St. John's L. Rev. 58; Comment, 11 San Diego L. Rev. 504; Note, 19 Stanford L. Rev. 654; Comment, 5 Sw. U. L. Rev. 417; Comment, 1 Wm. Mitchell L. Rev. 161.

291 Minn. 509, 189 N. W. 2d 165 (1971). In considering such a motion to dismiss, the trial judge would be justified in conditioning his ruling upon the willingness of the plaintiff to satisfy his claims against the defendant upon exhaustion of the policy limits.[12]

For the reasons stated, we conclude that it was not unfair on these facts to require defendant and State Farm to defend this action in Minnesota, and the decision of the trial court is therefore affirmed.

Affirmed.

OTIS, Justice (dissenting).

This is a case wherein two residents of Indiana were involved in an automobile accident in Indiana. One of the drivers (Rush) had purchased an automobile liability policy from State Farm Mutual Automobile Insurance Company. A year and a half after the accident the other Indiana resident (Savchuk) left that state and moved to Minnesota, whereupon he commenced this lawsuit against Rush for injuries suffered in the accident. As Minnesota courts could not constitutionally assert personal jurisdiction over Rush, Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958),[1] Savchuk sought to acquire quasi-in-rem jurisdiction.[2] However, Rush has no property in Minnesota. Consequently, Savchuk served a garnishment summons upon State Farm in an attempt to garnish any debt due and owing Rush by State Farm. In support of his

[12]Imposition of such a condition would be consistent with the policy expressed in Rintala v. Shoemaker, *supra*, and consistent with our view that this type of jurisdiction should be limited so as to make its exercise fair to both the insurer and the insured.

[1]Rush did not commit any "act by which [he] purposefully avail[ed] himself of the privilege of conducting activities within [Minnesota], thus invoking the benefits and protections of [our] laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. ed. 2d 1283, 1298 (1958).

[2]See, Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565 (1877).

action, Savchuk relies upon Minn. St. 571.41, subd. 2, relevant portions of which read:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:
>
> "(1) For the purpose of establishing quasi in rem jurisdiction.
>
> * * * * *
>
> "(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association.
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

It is not disputed that Rush is a nonresident individual; thus, subd. 2(1)(c) is satisfied and this case is a proper case for the exercise of quasi in rem jurisdiction.[3] It is also not disputed that State Farm and Rush are parties to a contract of insurance within the meaning of subd. 2(2). The question is whether, and to what extent, any obligation owed by State Farm can provide a means by which Savchuk can obtain quasi-in-rem jurisdiction over Rush.

Quasi-in-rem jurisdiction over a nonresident by the service of a garnishment summons on the defendant's nationwide insurer is a creature of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N.E. 2d 312 (1966). As the majority notes, the Seider procedure has been held improper as a matter of Federal maritime law[4] as well as of the law of almost all the states which have considered it.[5] Only an inferior court in one other state has adopted it.[6] Commentary has been highly critical.[7] Even in the state of its birth, the procedure remains only because of the opinion of Judge Charles D. Breitel, in which Judge Bergan concurred, in Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N.E. 2d 669 (1967), the case which reaffirmed Seider. Judge Breitel, appointed to the New York Court of Appeals after Seider, and replacing one of the judges who was in the 4-3 majority in that case, and Judge Bergan, who had dissented in Seider, cast the deciding votes in Simpson for the following reasons:

> "* * * Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule re-

[3]Subd. 2(1) is merely procedural, defining the types of defendants over which the exercise of quasi-in-rem jurisdiction is proper. Thus, a court must assert personal jurisdiction over a resident defendant who can be found within the state, and cannot proceed quasi in rem. Of course, subd. 2(1) does not say that quasi-in-rem jurisdiction can be asserted over defendant there listed in all cases, for an additional element is needed—something to garnish, i.e., property located within this state. "If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate." Pennoyer v. Neff, 95 U.S. 714, 723, 24 L. ed. 565, 569.

[4]Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970).

[5]Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 1387 (Okla. 1972); Jardine v. Donnelly, 413 Pa. 474, 198 A. 2d 513 (1964); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Howard v. Allen, 254 S. C. 455, 176 S. E. 2d 127 (1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967). See, also, Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972); Kirchman v. Mikula, 443 F. 2d 816 (5 Cir. 1971); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970).

[6]Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973). The decision cited in the majority opinion, Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973), is discussed *infra*.

[7]See footnote 11 in the majority opinion.

quire some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.

"It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.

* * * * *

"Accordingly, I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed." 21 N. Y. 2d 314, 287 N. Y. S. 2d 640, 234 N.E. 2d 674.

Some of the undesirable practical consequences have already arisen. Thus, New Hampshire has adopted the rule that if the nonresident defendant lives in a state which has adopted Seider—i.e., New York—then that defendant's insurer can be garnished in New Hampshire if the insurer does business there. Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973).[8] On the other hand, if the defendant lives in a state which has rejected Seider—e.g. Connecticut—then his insurer cannot be garnished. Robitaille v. Orciuch, 382 F. Supp. 977 (D. N.H. 1974). In Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S. 2d 521 (1968), New York was presented with a case in which a

[8]In Forbes the New Hampshire Supreme Court stated: "We are not holding that the *Seider* rule is to be applied generally to all cases of foreign motorists insured by a company with an office in this State and licensed to do business in New Hampshire. We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the *Seider* rule prevails the trial court properly denied the defendant's motion to dismiss plaintiff's action." 113 N. H. 624, 313 A. 2d 133.

Norwegian resident attempted to garnish in New York the insurer of a North Carolina defendant with respect to an accident which took place in North Carolina. It was held that allowing garnishment in that case would violate the principles of forum non conveniens and due process.[9] In light of the fact that most of our sister states which have considered Seider have rejected it, that the commentary is uniformly critical, that a majority of the court which spawned Seider now believes it to be in error, and mindful of its potentially undesirable consequences, I would decline to adopt it in Minnesota. Whether or not it is authorized by § 571.41, subd. 2(2), in my opinion it is unconstitutional as applied to the defendant in this case.

The majority opinion limits the use of the Seider procedure to residents of Minnesota. This is probably constitutionally required.[10] As Judge Earl Larson said in Adkins v. Northfield Foundry & Machine Co. 393 F. Supp. 1079, 1081 (D. Minn. 1974):

> "One of the principal reasons to limit *Seider* type jurisdictions is that without such limitations, blatant forum shopping would be possible. * * * Further, this limitation is required to give the forum State a recognizable and protectable interest and to prevent an unfair burden that might be placed upon both the nonresident defendant and its insurance company."

[9]See, also, Nationwide Mutual Ins. Co. v. Vaage, 265 F. Supp. 556 (S. D. N. Y. 1967).

[10]Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969), affirming 295 F. Supp. 228 (S. D. N. Y. 1968); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S 2d 521 (1968); Varady v. Margolis, 303 F. Supp. 23 (S. D. N. Y. 1968); Public Admr. of County of New York v. Unimar Shipping Co., Ltd., 401 F. Supp. 313 (S. D. N. Y. 1975); Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Adkins v. Northfield Foundry & Machine Co., 393 Supp. 1079 (D. Minn. 1974).

In Rintala v. Shoemaker, 362 F. Supp. 1044, 1056 (D. Minn. 1973), the late Judge Philip Neville expressed the reasons behind this limitation:

> "The fear is that unless this limit is placed on *Seider* type jurisdiction blatant forum shopping would be possible since many insurance companies, including Aetna, do business in all fifty states. Further, the essential connection between the forum state and the accident at all, the connection which provides the forum state with a recognizable and protectable interest, is that the forum is the residence of the plaintiff. This limit on *Seider* jurisdiction is not only reasonable but it limits any inconvenience which the insurance company might suffer. The only additional state in which garnishment might be had is the resident of the plaintiff. * * *
>
> "* * * On the facts of this case Aetna is simply exposed to an action in one more jurisdiction than it would be otherwise. This certainly is no intolerable burden on it or a similarly situated garnishee."

In the case at bar, plaintiff and defendant were both residents of Indiana when this accident occurred.[11] At that time, under the limitation on Seider, Rush and State Farm were amenable to suit in only one jurisdiction—Indiana. If Savchuk had been a Minnesota resident at that time suit could have been brought in only two states—Indiana and Minnesota. However, if jurisdiction is permissible in

[11]Plaintiffs statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota.

this case Rush and State Farm are amenable to suit in all 50 states.

If a motorist in another state drives negligently and injures a Minnesotan, a strong case can be made that this state's interests are sufficiently great to allow our courts to use the Seider procedure for obtaining jurisdiction over the case. As Judge Neville put it, such a motorist "is simply exposed to an action in one more jurisdiction that [he] would be otherwise." 362 F. Supp. 1056. However, allowing a potential plaintiff to move to this state after his cause of action has arisen and to invoke Seider to bring the case to Minnesota means that a plaintiff has a choice of 50 jurisdictions in which to sue. Such a result in my opinion violates due process.[12] Rush did not injure one who was a Minnesota resident on the day of the accident. He should not be forced to defend himself in a Minnesota court.

Under the policies of Schwartz v. Consolidated Freightways Corp. 300 Minn. 487, 491, 221 N. W. 2d 665, 668 (1974)—advancement of Minnesota's governmental interests and application of the better rule of law—Minnesota's comparative negligence law, and not Indiana's contributory negligence law, will apply. Thus, if Rush injures another Indiana resident in Indiana, and that person is able to establish residence in a new jurisdiction, he may use Seider to bring the defendant in and defend, and avoid Indiana's contributory negligence law. Under the majority opinion, if my next-door neighbor is negligently injured on my property he is free to move to any other state where

[12]In the only reported case where this issue was presented, Robitaille v. Orciuch, 382 F. Supp. 977 (D. N. H. 1974), jurisdiction was denied on other grounds. See this discussion of Robitaille and Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973), *supra*.

my homeowners insurer transacts business and force me to defend there.

The majority opinion's answer is that the defendant is free to move to dismiss on grounds of forum non conveniens. However, that presupposes jurisdiction, which I cannot accept.[13]

Accordingly, I would reverse and hold that Minn. St. 571.41, subd. 2(2), is unconstitutional as applied to this case. It would not then be necessary to reach the issue of whether Seider is to become the rule of this state.

---

[13]"The district courts of this state may fairly exercise their discretion in declining to accept jurisdiction of transitory causes of action brought here by citizens or noncitizens of this state who are nonresident when it fairly appears that it would be more equitable that the cause of action be tried in some other available court of competent jurisdiction." Johnson v. Chicago B. & Q. R Co., 243 Minn. 58, 79, 66 N.W. 2d 763, 776 (1954).

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543
June 27, 1977

James F. Roegge, Esq.
Meagher, Geer, Markham, Anderson, et al.
2250 IDS Center
80 South Eighth St.
Minneapolis, MN 55402

RE: Rush and State Farm Mutual Automobile Ins. Co. v. Savchuk, 76-846

Dear Sir:

The Court today entered the following order in the above-entitled case:

The judgment is vacated and the case is remanded to the Supreme Court of Minnesota for further con-

sideration in light of *Shaffer* v. *Heitner*, 433 U.S. — (1977).

Very truly yours,

Michael Rodak, Jr., Clerk
By /s/ Helen Taylor
Assistant Clerk

CC: Richard B. Allyn, Esq.
Solicitor General of Minnesota
515 Transportation Bldg.
St. Paul, MN 55155
Richard I. Diamond, Esq.
Schermer, Schwappach, et al.
1010 Midwest Plaza Bldg.
801 Nicollet Mall
Minneapolis, MN 55402

APPENDIX D

[Minnesota Supreme Court]

No. 268 (1975)
Hennepin County

JEFFREY D. SAVCHUK,

Respondent,

vs.

45556

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Wahl, J. Dissenting, Otis, Rogosheske, and Peterson, JJ.

Endorsed
Filed October 20, 1978, John McCarthy, Clerk Minnesota Supreme Court

SYLLABUS

The assertion of quasi-in-rem jurisdiction through garnishment of an insurer's obligation to an insured, pursuant to Minn. St. 571.41, subd. 2, as limited by Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976), is consistent with the due process standards of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977).

Affirmed.

Considered and decided by the court en banc.

OPINION

WAHL, Justice.

On remand from the United States Supreme Court for further consideration in light of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977). For the reasons below, we distinguish Shaffer v. Heitner, *supra*, and hold that the assertion of jurisdiction pursuant to Minn. St. 571.41, subd. 2, as limited by our earlier decision in Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976), vacated and remanded, 433 U.S. 902, 97 S. Ct. 2964, 53 L. ed. 2d 1086 (1977), is consistent with the standards established by International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 2d 95 (1945), and its progeny.

The facts are as stated in the earlier decision. Plaintiff, Jeffrey Savchuk, was injured in a single-car accident in Elkhart, Indiana, on January 13, 1973. At the time of the accident, both Savchuk, a senior in high school, and the driver of the car, defendant Randal Rush, were Indiana residents. In June 1973, Savchuk moved with his parents to Minnesota, where he became employed, was married and continues to reside. The personal injury action was commenced in district court, Hennepin County, on May 28, 1974. Savchuk served a garnishment summons on garnishee State Farm Insurance pursuant to Minn. St. 571.41, subd. 2[1] and Minn. St. 60A.19, subd. 1(3). Defendant

[1]Minn. St. 571.41, subd. 2, states: Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:

* * * * *

Rush, still an Indiana resident, was personally served with a copy of the garnishment summons and copies of the summons and personal injury complaint.

By order, the district court denied the motion of Rush and State Farm to dismiss for lack of jurisdiction and insufficient process. They appealed to this court and the order was affirmed. Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976).

Upholding the constitutionality of Minnesota's garnishment provision, Minn. St. 571.41, subd. 2, this court found that procedure "consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum limits consistent with due process." 245 N.W. 2d 628. The statute was interpreted to satisfy three due process requirements: the provision of adequate notice to defendant-insured; a limitation of liability to insurance policy amounts; and restriction of use to plaintiffs who reside in the forum state. 245 N.W. 2d 628.

(b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:

* * * * *

(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that

* * * * *

(b) defendant is a nonresident individual, or a foreign corporation, partnership or association.

(3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

(4) The creditor has been unable to serve upon the debtor the summons and complaint in the main action because the debtor has been inaccessible due to residence and employment in buildings where access is restricted.

On June 24, 1977, the United States Supreme Court vacated that judgment and remanded the case for further consideration in light of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977), which requires, in particular, that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe Co. and its progeny" 97 S. Ct. 2584-85.

The issue now before this court is whether Minnesota's assertion of jurisdiction over out-of-state defendants pursuant to Minn. St. 571.41, subd. 2. as limited by this court in Savchuk, *supra,* satisfies the due process standards set forth in International Shoe Co. and Shaffer.

In Shaffer, *supra,* a nonresident plaintiff filed a shareholder's derivative suit in Delaware state court, naming as defendants Greyhound (a Delaware corporation), Greyhound Lines (its wholly-owned subsidiary incorporated in California), and 28 present or former officers or directors of one or both of the corporations, none of the last being Delaware residents The complaint alleged that the individual defendants had violated their duties to the corporation and its subsidiary by permitting activities in Oregon which made the company liable for substantial antitrust litigation, damages, and criminal contempt fines. The Delaware court obtained jurisdiction by sequestering, via stop-transfer orders, Greyhound stock owned by the individual defendants.[2]

[2]8 Del. Code Ann. § 169 makes Delaware the situs of ownership of stock in Delaware corporations; the rule in the other 49 states places that situs in the state of the owner's residence. 97 S. Ct. 2588 (Stevens, concurring).

Sequestration is a seizure of property used to compel the personal appearance of the nonresident defendant. See, 10 Del. Code Ann. § 366. Although liability is limited to the value of the property seized, potential liability here was $1.2 Million. 97 S. Ct. 2574 n 7.

On appeal to the Delaware Supreme Court, one constitutional challenge to the jurisdiction-by-sequestration procedure was side-stepped:

> "There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. * * * The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum * * *." Greyhound Corporation v. Heitner, 361 A. 2d 225 (Del. 1976), reversed sub nom, Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569.

The United States Supreme Court overruled this categorical in rem/in personam jurisdiction analysis:

> "* * * in order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdicion over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in International Shoe [Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 2d 95 (1945)]. 433 U.S. 207, 97 S. Ct. 2582, 53 L. ed. 2d 699.
>
> "* * * For in cases such as Harris [v. Balk, 198 U.S. 215 (1905)] and this one, the only role played by the property is to provide the basis for bringing the defendant into court. Indeed, the express purpose

of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance. In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction would be equally impermissible." 433 U.S. 209, 97 S. Ct. 2583, 53 L. ed. 2d 701.

Evaluating the sequestration procedure by that standard, the court held Delaware's assertion of jurisdiction to be inconsistent with the due process "minimum contacts" limitation on state power. It found the asserted state interest in supervising the management of local operations to be imperfectly served by the sequestration procedure, which is not expressly limited to corporate fiduciaries and does not even guarantee jurisdiction over all such figures.[3] 433 U.S. 214, 97 S. Ct. 2585-86, 53 L. ed. 2d 704. Though such an interest might support the application of Delaware law to the controversy, choice of law does not necessarily establish jurisdiction over the parties. 433 U.S. 215, 97 S. Ct. 2586, 53 L. ed. 2d 704. Accordingly, judgment was reversed.

Shaffer generally directs the application of International Shoe Co. standards to all assertions of state court jurisdiction, 433 U.S. 212, 97 S. Ct. 2584, 53 L. ed. 2d 703, but the necessary consequences for jurisdiction under Minn. St. 571.41, subd. 2, are not clear. That statute embodies the rule of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N. E. 2d 312 (1966). It pro-

[3]Heitner failed to secure jurisdiction over seven of the individual defendants since Delaware law does not require directors to own stock. 8 Del. C. § 141 (b).

vides jurisdiction over a nonresident defendant via garnishment of a contractual obligation, the obligation of the insurance company (doing business in this state) to defend and indemnify the nonresident, insured defendant. Under the statute, as interpreted in our earlier opinion, the nonresident defendant is guaranteed notice, his liability is limited to the policy's face amount and the procedure may be utilized only by residents of the forum state. Savchuk v. Rush, *supra*.

Although Seider v. Roth-type jurisdiction is undoubtedly the most highly controversial and significant contemporary application of the doctrine of quasi-in-rem jurisdiction, it does not appear in the historical discussion in Shaffer.[4]

Since Shaffer, New York courts have split over its implications for Seider v. Roth-type jurisdiction. Several trial courts have held such jurisdiction to be precluded by Shaffer: Torres v. Towmotor Division of Caterpillar, Inc. D. C. — F. Supp. — (E.D. N.Y. 1977) (cited in Alford v. McGaw, 402 N Y.S. 2d 499 (N.Y. App. Div. 1978); Rodriguez v. Wolfe, 401 N.Y.S. 2d 442 (N.Y. Sup. 1978); Attanasio v. Ferre, 401 N.Y.S.2d 685 (N.Y. Sup. 1977); Datz v. Umansky, 399 N.Y.S. 2d 412 (N.Y. Sup. 1977); Kennedy v. Deroker, 398 N.Y.S. 2d 628 (N.Y. Sup. 1977). Other trial courts have held that such jurisdiction does not offend due process: O'Connor v. Lee-Hy Paving Corp. 437

[4]The United States Supreme Court has never considered the constitutionality of the procedure, twice declining to review appellate decisions sustaining the exercise of Seider v. Roth jurisdiction: Minichiello v. Rosenberg, 410 F. 2d 106 (2 Cir. 1968) affirmed on rehearing en banc, 410 F. 2d 117, certiorari denied. 396 U. S. 844, 90 S. Ct. 69, 29 L. ed. 2d 94 (1969), Victor v. Lyon Assoc. Inc., 21 N.Y. 2d 695, 287 N.Y.S. 2d 424, 234 N. E 2d 459 (1967), appeal dismissed for want of a substantial Federal question, sub nom, Hanover Ins. Co. v. Victor, 393 U. S. 7, 88 S. Ct. 44, 21 L. ed. 2d 94 (1968).

F. Supp. 994 (E.D.N.Y. 1977), affirmed, 579 F. 2d 194 (2 Cir. 1978); Wallace v. Target Store, Inc. 400 N.Y.S. 2d 478 (N.Y. Sup. 1977). Most recently, a New York appellate court upheld the exercise of Seider-type jurisdiction in light of Shaffer v. Heitner. Alford v. McGaw, 402 N.Y.S. 2d 499 (N.Y. App. Div. 1978).

This exercise of jurisdiction differs in many important respects from the Delaware sequestration procedure invalidated in Shaffer: First, sequestration did not parallel the asserted state interest in the management of state-chartered corporations—sequestration could be used in *any* suit against a nonresident, and in fact did not guarantee jurisdiction over corporate fiduciaries. By contrast, Minnesota's garnishment procedure specifically premises jurisdiction on attachment of the obligation to respond to claims in the underlying action, Minn. St. 571.41, subd. 2(3). Delaware's interest in supervising its corporations' fiduciaries established only the propriety of Delaware *law*, not necessarily a Delaware *forum*. 433 U.S 214-15, 97 S. Ct. 2586, 53 L. ed. 2d 704-05. Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs[5] not

[5]Cf. Minichiello v. Rosenberg, 410 F. 2d 106 (2 Cir. 1968); McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. ed. 2d 223 (1957); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927).

A state's interest in providing a forum for its residents is particularly strong where an alternative forum would not have permitted recovery. In the instant case, Indiana's guest statute would have cut off Savchuk's claim. Ind. Stat. § 9-3-3-1. A plaintiff's lack of access to an alternative forum might be a legitimate consideration in justifying exercise of jurisdiction. Shaffer v. Heitner, 433 U. S. 211, 97 S. Ct. 2584, 53 L. ed. 2d 702, n. 37. We also note, in this regard, that by the time the trial court ruled on Savchuk's motion to amend the complaint by making State Farm Mutual a party, the Indiana two-year statute of limitations had run.

One commentator states that a plaintiff's residence "may be deemed an overriding minimum contact" sufficient to justify the exercise of jurisdiction, where no alternative forum exists. Zammit. Quasi-in-Rem Jurisdiction: Outmoded & Unconstitutional? 49 St. John's L. Rev. 668, 682 (1975).

only requires provision of a local forum, but may override traditional choice of law analysis. See, Schwartz v. Consolidated Freightways Corp. of Delaware, 300 Minn. 487, 221 N.W. 2d 665 (1974), appeal after remand, 306 Minn. 564, 237 N.W. 2d 385 (1975) (applying Minnesota comparative negligence law where plaintiff was a Minnesota resident, although accident occurred in contributory-negligence state.) The stock sequestered in Delaware was completely unrelated to the plaintiff's cause of action, constituting only an attachable asset used to compel the defendants' personal appearance. 433 U.S. 208-09, 97 S. Ct. 2585, 53 L. ed. 2d 700-01. In the instant case, the insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In the accident litigation, however, it is inevitably the focus, determining the rights and obligation of the insurer, the insured, and practically speaking, the victim.

More importantly, because this assertion of state court jurisdiction is, as has long been acknowledged, a "hybrid," its jurisdiction does not rest exclusively on Harris v. Balk.[6]

[6]Most recently in O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194 (2 Cir. 1978), the Second Circuit Court of Appeals by Judge Friendly distinguished Seider from Harris in light of Shaffer.

"What sharply differentiates these cases from those just hypothesized is that a judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability and in an appropriate case to allow the plaintiff to recover from the insurer * * *. What we said in *Minichiello, supra,* nine years ago *apropos of Harris v. Balk* remains just as true today: '* * * *a Seider judgment would mean simply that liability policies, on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.*' 410 F. 2d 118 (emphasis supplied). Moreover, since the

This court and other courts have evaluated due process challenges to such an assertion of jurisdiction in terms of minimum contacts and fairness. Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624, 629 (1976); Simpson v. Loehmann, 21 N.Y. 2d 305, 311, 287 N.Y.S. 2d 633, 637, 234 N.E. 2d 669, 672 (1967); Rintala v. Shoemaker, 362 F. Supp. 1044, 1053 (D. Minn. 1973). See, Alford v. McGaw, 402 N. Y .S. 2d 499, 502 (N. Y. App. Div. 1978).

Just as Shaffer compels perforation of the *in rem* fiction as a jurisdictional base, we are obligated to consider the practical relationship between the insurer and the nominal defendant here. The insurer's garnished obligation to respond is complemented by the insured's obligation to cooperate. Our limitation of liability to policy limits protects the named defendant from personal exposure. The result is often labeled a procedural alternative to a direct action statute, a preferred alternative which permits insurer anonymity. See, Alford v. McGaw, 402 N. Y. S. 2d 499, 503 (N. Y. App. Div. 1978); See, also, Mehren & Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis," 79 Harv. L. Rev. 1121, 1168. This label does not obviate the due process scrutiny. Cf., Watson v. Employers Li-

insurance policy was purchased to protect against the type of liability which is the subject of the lawsuit and since the obligation to defend clearly encompasses the litigation, *Seider* does not sanction 'the type of *quasi in rem* action typified by *Harris v. Balk* and the present case [sequestration of shares in a Delaware corporation],' where the property which 'serves as the basis for * * * jurisdiction is *completely unrelated* to the plaintiff's cause of action,' *Shaffer v. Heitner, supra*, 433 U. S. 208-09, 97 S. Ct. 2582, 53 L. ed. 2d 700-01 (emphasis supplied.) The fall of *Harris v. Balk* therefore does not necessarily topple *Seider*, * * *."

See, also, Smit, "The Enduring Utility of In Rem Rules: A Lasting Legacy of *Pennoyer v. Neff*," 43 Brooklyn L. Rev. 600, 603-24 (1977), cited in Shaffer, 433 U. S. 208, 97 S. Ct. 2582, 53 L. ed. 2d 700, n. 30 and, Jonnet v. Dollar Sav. Bank of New York, 530 F. 2d 1123, 1138-39 (3 Cir. 1976) (Gibbons, J., concurring), cited in Shaffer, 433 U. S. 205, 97 S. Ct. 2581, 53 L. ed. 2d 698.

ability Assurance Corp. 348 U.S. 66, 75 S. Ct. 166, 99 L. ed. 74 (1954); it does, however, serve to minimize the traditional "jurisdictional bias" in favor of the nominal defendant.

Similarly, limiting the availability of this type of quasi in rem jurisdiction to residents of the forum, Savchuk v. Rush, — Minn. —, 245 N.W. 2d 628 (1976), minimizes the potential for abuse and forum shopping.[7] See, Rintala v. Shoemaker, 362 F. Supp. 1044, 1056 (D. Minn. 1973). Again, we note that the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non-conveniens, should the defendant's burden outweigh the plaintiff's interest in a Minnesota forum and other relevant factors. 245 N. W. 2d 630.

We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite "contacts, ties or relations" to those defending parties as to offend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision.

Accordingly, the order of the district court is affirmed.

OTIS, Justice (dissenting).

The inference to be drawn from this remand is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme Court. As I

[7]Although Jeffrey Savchuk was a resident of Indiana at the time of the accident, Savchuk, then 19 years old, accompanied his parents in their move to Minnesota six months later. He has established and continued residency; we find no suggestion of forum-shopping in the record.

construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.

Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.

First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.

Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.

Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff*. 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01.

1. The majority holds that while the stock sequestered in Shaffer "was completely unrelated to plaintiff's cause of action" the State Farm's obligation to defend and indemnify is "inevitably the focus" in this litigation and determines "the rights and obligations of the insurer, the insured, and practically speaking, the victim." However, this is not the test of jurisdiction, I submit.

Under the explicit holding of Shaffer, whether or not State Farm's contingent liability is a property right is wholly immaterial unless it is the subject matter of the litigation. There is no dispute as to the amount of scope of coverage under the policy. It is no more the subject of the litigation than would be a bank account available in Minnesota to satisfy the judgment. Absent a controversy involving the policy which is justiciable in Minnesota, the mere happenstance of an asset such an insurance being available to satisfy a judgment no longer confers in rem jurisdiction. In other words, the fact defendant is financially responsible in Minnesota is not enough without some other "contacts, ties, or relations" with the state as defined in International Shoe v. Washington.

2. A policy of providing a forum to residents of this state, extending our jurisdiction to the maximum limits consistent with due process is relied on by the majority. This is certainly the legislative intent and one with which I have no quarrel. The problem is that the majority stresses the forum's relationship with the plaintiff, whereas the constitutional test is the contact of the defendant with the forum.

The majority leans on note 37 in Shaffer for the proposition that the unavailability to plaintiff of any other forum is an important factor in acquiring jurisdiction over a nonresident defendant. That note, however, gives no support for such a rule. It merely states "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. 211, 97 S. Ct. 2584, 53 L. ed. 2d

702, n. 37. Nor can I agree that "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum but may override traditional choice of law analysis." The Schwartz case, cited in reliance for that rule, must be read in the context of Shaffer, now the governing law. No mention is made in Shaffer of the relevance of "minimum contacts" between plaintiff and the forum as modifying the rules set forth in International Shoe.[1]

3. This is an action for personal injuries and not a delaratory judgment suit to construe a liability policy. As in Shaffer the plaintiff did not allege and does not now claim that defendant ever set foot in Minnesota. He does not identify any act related to his cause of action as having taken place in Minnesota. The issue of in personam jurisdiction was extensively discussed in Hanson v. Denckla, 357 U.S. 235, 250-55, 78 S. Ct. 1228, 1238-40, 2 L. ed. 2d 1283, 1296-98 (1958). In that case the United States Supreme Court affirmed the decision of a Delaware court refusing to give full faith and credit to a Florida probate proceeding on the ground the Florida court failed to have jurisdiction over a Delaware trustee holding property which was the subject of the Florida probate proceedings. In affirming the decision of the Delaware court the Supreme Court made these observations:

> "As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714 to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 357 U.S. 250-51, 78 S. Ct. 1238, 2 L. 3d. 2d 1296.

[1]In Shaffer both the plaintiff and the defendants were nonresidents of the forum.

The court stressed the fact that the trust agreement was executed in Delaware and the settlor was domiciled at that time in Pennsylvania and did not become domiciled in Florida until some years later. The court reached the following conclusion:

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of

its laws." 357 U.S. 253, 78 S. Ct. 1239-40, 2 L. ed. 2d 1298.

* * * * *

"It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur." 357 U.S. 254, 78 S. Ct. 1240, 2 L. ed. 2d 1298.

* * * * *

"* * *It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction." 357 U.S. 254, 78 S. Ct. 1240, 2 L. ed. 2d 1298.

4. When plaintiff was injured, he and defendant were both Indiana residents, driving on an Indiana highway in a car registered in Indiana and insured in Indiana by a policy written in that state. The record discloses no relationship between defendant and the State of Minnesota. The fact that his insurer also does business in Minnesota is not, of course, attributable to any activity on the part of defendant. To paraphrase the words of Mr. Justice Marshall in Shaffer, defendant has simply had nothing to do with the State of Minnesota and had no reason to expect to be haled before a Minnesota court. By acquiring an insurance policy with State Farm he did not surrender his right to be brought to judgment only in a state with which

he had minimum contacts. Mr. Justice Stevens' comments in his concurring opinion apply with equal force to the role of defendant's liability insurance in this case:

"One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. * * * * * If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the state of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation." 433 U.S. 218-19, 97 S. Ct. 2587-88, 53 L. 3d. 2d 706-07.

Shaffer reiterates the rule laid down in International Shoe and applies it to in rem jurisdiction:

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. 319, 66 S. Ct. 160, 90 L. ed. 2d 104.

Defendant himself, it is conceded, has not simply had minimum contacts with Minnesota. He has had no contacts with Minnesota. Under such circumstances it is not my notion of fair and orderly administration of justice to

require a citizen of Indiana, because he carried liability insurance, to come to Minnesota to defend himself against the claims of another Indiana citizen who has had no contact with this state until his parents elected for undisclosed reasons to make Minnesota his residence. As was noted in the prior dissent:

> "Plaintiff's statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota." — Minn. —, 245 N.W. 2d 644, 633 n. 11 (1976).

Our long-arm statute is designed essentially to give redress to bona fide citizens of Minnesota who have suffered a wrong by the harmful intrusion of a nonresident into this jurisdiction. It is reasonable to expect nonresidents who do business here or who otherwise enjoy the privileges and protection of our laws to respond in our courts for injury caused citizens of this state by virtue of their activities. However, where, as here, the injury occurred in a foreign state at a time when Minnesota had no connection with either the parties or the cause of action, I fail to see the logic or the beneficial public policy of encouraging after-the-fact forum shopping to secure retroactive jurisdiction in this state.

Accordingly I would reverse.

ROGOSHESKE, Justice (dissenting).

I join in the dissent of Mr. Justice Otis.

PETERSON, Justice (dissenting).

I join in the dissent of Mr. Justice Otis.

APPENDIX E

STATE OF MINNESOTA, SUPREME COURT

JEFFREY D. SAVCHUK,

Respondent,

vs.

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Pursuant to the Mandate of the U.S. Supreme Court dated July 29, 1977, the judgment of this Court dated and entered on September 27, 1976, be and hereby is vacated. Pursuant to an order of this Court heretofore duly made and entered in this cause on October 20, 1978, it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellants herein the sum and amount of Two Hundred Sixty-Nine and 78/100 DOLLARS, ($269.78) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 3, 1978.

BY THE COURT

Attest:

JOHN McCARTHY

Clerk

APPENDIX F

(Title of Cause.)

45556

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that defendant Randal Rush and the garnishee State Farm Mutual Automobile Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Minnesota Supreme Court, which judgement was entered on November 3, 1978, and which judgment reaffirmed a previous judgment of the Minnesota Supreme Court of September 27, 1976, and which judgment was vacated and remanded by the United States Supreme Court pursuant to the Order of the United States Supreme Court of June 27, 1977.

This appeal is taken pursuant to 28 U. S. C. §1257(2) and, alternately, 28 U. S. C. §2103.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
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Attorneys for Appellants
(612) 338-0661

STATE OF MINNESOTA

ss

COUNTY OF HENNEPIN

AFFIDAVIT OF SERVICE BY MAIL

Gay L. Cleary, being first duly sworn, deposes and says:

That on the 17th day of November, 1978, she served the attached Notice of Appeal to the Supreme Court of the United States upon the following attorneys representing the parties as indicated, by depositing a true and correct copy thereof in the U.S. Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to said attorneys.

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/s/ GAY L. CLEARY

Subscribed and sworn to before me this 17 day of November, 1978.

/s/ VIVIAN L. FLATEN
Notary Public
Hennepin County, Minn.

My Commission Expires Dec. 15, 1978